Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments	WC Docket No. 07-245 RM-11293 RM-11303

To: The Commission

REPLY COMMENTS OF NEXTG NETWORKS, INC.

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April 22, 2008

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NextG Networks, Inc., on behalf of its operating subsidiaries NextG Networks of NY, Inc., NextG Networks of California, Inc., NextG Networks Atlantic, Inc., and NextG Networks of Illinois, Inc. ("NextG"), respectfully submits these Reply Comments in response to the initial comments filed pursuant to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("Commission") in the captioned proceeding.

I. INTRODUCTION AND SUMMARY

Despite devoting only a single paragraph of the NPRM to the issue of wireless attachments, the Commission received a sizeable number of initial comments relating to this important issue. In all, nine entities with an interest in wireless attachments filed comments, including three industry associations – CTIA, the DAS Forum, and the Wireless Communications Association International ("WCA").[1] In addition, comments filed by 19 electric utilities, one ILEC pole owner (Qwest) and the Utah Public Service Commission

[1] In addition to NextG and the industry associations, the other wireless attachers who submitted comments were T-Mobile, Crown Castle Solutions, MetroPCS Communications, ExteNet Systems and FiberTower Corporation.

specifically addressed wireless attachment issues.[2] The Commission, therefore, has before it substantial record evidence upon which it can promulgate wireless-specific rules, and as the initial comments make clear, such rules are needed. This record will be further supplemented with these reply comments.

A review of the initial comments makes clear that the obstacles, roadblocks, and delays to pole access that NextG faces on a daily basis are by no means unique. Wireless attachers from across the country described to the Commission first-hand experiences with lengthy delays, demands for exorbitant "market" pole rental fees, categorical denials of access to pole tops on the basis of unfounded safety concerns, and a host of egregious terms and conditions of attachment. These comments vividly demonstrate that the *status quo* is not working, and there is an immediate need for wireless-specific pole attachment regulations. Several consistent themes emerged in the comments of wireless attachers:

- **Utilities Are Imposing Unreasonable Attachment Fees.** Consistent with NextG's experience, wireless attachers reported that they are routinely being charged annual attachment rates in excess of $1,000 per year – rates that cannot conceivably be justified on any historic cost basis (as required by Section 224).

- **Utilities Are Denying Access to Utility Poles for Wireless Attachments.** The lack of wireless-specific attachment rules and clear guidance has created ambiguities and differing interpretations by utilities that have acted to impede, restrict or outright deny wireless attachers access to utility poles.

- **Utilities Are Delaying Access to Poles for Wireless Attachments.** NextG and other wireless attachers described how it can take months or as long as three years to negotiate a wireless pole attachment agreement, typically as a result of run-around or delay by

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[2] The electric utilities that addressed wireless issues were in their initial comments were: the Coalition of Concerned Utilities (Allegheny Power, Baltimore Gas & Electric, Dayton Power and Light, FirstEnergy, Kansas City Power & Light, National Grid and NSTAR); the Southern Company utilities (Alabama Power, Gulf Power, Mississippi Power and Georgia Power); Ameren Services Company and Virginia Electric and Power; Florida Power & Light, Tampa Electric and Progress Energy Florida; and PacifiCorp., Wisconsin Electric Power and Wisconsin Public Service Corporation.

utilities. Wireless attachers also encounter other delays in the placement of facilities on utility poles, particularly regarding completion of make-ready.

The comments filed by the vast majority of the electric utilities elicit a strong sense of *déjà vu*. The electric utilities all too frequently ask the Commission to roll back the clock to 1995 and declare wireless attachments to be unregulated. Some utilities simply ask that the *status quo* be maintained – the ineffective results of which are described above. In response to the pole owners' comments, NextG submits the following.

- **The Commission Should Reject the Utilities' Call for "Market" Rates for Wireless Attachments.** There is no "market" for utility poles, even for wireless attachments, as some utilities claim. Section 224 and longstanding Commission precedent requires wireless attachment to be afforded regulated, historic cost-based rates. The Commission should reject certain utilities' call for "market" rates, which result in annual attachment fees of thousands of dollars. Instead, the Commission should expressly order that wireless attachments be charged no more than the utility's "telecom" pole attachment rate, multiplied by the number of feet of usable space on the pole actually occupied by the wireless attachment. This approach is straight-forward and presents no computational "difficulties" as the utilities suggest.

- **Pole Top Attachments Should Not Result in a Higher Rate of Compensation.** Among electric utilities, only the Coalition of Concerned Utilities took the extreme – and logically unsound – position that pole-top attachments warrant unregulated rates. The comments make clear that a pole top is no more "unique" than any other position on a pole, and certainly does not warrant a higher rate of compensation or unregulated rates. Moreover, the Act does not allow such deregulation.

- **The Commission Should Adopt a Rule Establishing A Presumption Allowing Pole-Top Attachments.** Section 224 permits utilities to deny access to wireless attachments *only* on the basis of "safety, reliability, and generally applicable engineering purposes." The utility comments make clear that they have used this narrow exception to swallow the general rule of non-discriminatory access – based on little more than nebulous and unfounded "concerns" and "questions" about safety and reliability. NextG is very serious in its compliance with applicable safety and engineering standards. Indeed, NextG has every interest in safe attachment practices by all parties for the protection of its own workers as well as those of other companies. Pole owners' comments, however, misuse "safety" as a basis for their behavior. These supposed questions raised by the utilities have already been answered by pre-existing regulations, governing mandatory safety standards, and/or standard industry procedures. In order to rectify the current situation, the Commission should adopt a rule establishing a presumption allowing pole-top attachments. Despite several utilities' assertions to the contrary, the Commission has jurisdiction over an *entire* utility pole – not a small portion thereof – and has the authority

to promulgate such a rule. The Commission has repeatedly exercised this authority and also repeatedly held that it – not utilities – is the final arbiter with respect to safety and reliability issues.

- **The Commission Should Adopt a Rule Permitting Qualified Workers to Perform Make-Ready and to Install and Maintain Wireless Attachments.** There is a need for a rule expressly permitting the use of qualified contractors because some utilities are failing to heed the Commission's otherwise clear precedent ruling as such. Utilities should not be permitted to have sole control over the labor pool of qualified electrical workers, as some suggest. NextG's proposed rule will expand employment opportunities and create a "deep bench" of qualified workers, who will be available for large-scale restoration projects during emergencies or disasters.

The Commission is not working from a blank slate on wireless attachment issues. In the past 12 years, many issues have been resolved by sound, judicially-approved Commission precedent. The time has come for the Commission to move forward and promulgate a set of wireless attachment-specific rules (or general rules that explicitly include wireless attachments) to promote the efficient, prompt deployment of the "third pipe" for broadband by reigning in the continuing pattern of utility abuses chronicled in the initial comments.

II. SYNOPSIS OF COMMENTS BY ENTITIES SEEKING TO ATTACH WIRELESS DEVICES

In it is Initial Comments, NextG explained that it continues to face serious obstacles and roadblocks from utilities – particularly electric utilities – as it attempts to secure fair and reasonable access to utility poles. These roadblocks endure despite pronouncements from the Commission that wireless devices qualify as attachments and are subject to the rights and protections of Section 224. NextG explained that on a regular basis it encounters lengthy delays, demands for exorbitant pole rental fees, categorical denials of access to pole tops on the basis of unfounded safety concerns, and a host of egregious terms and conditions of attachment. NextG believes that this problem stems in large part from the fact that the Commission has not adopted wireless-specific pole attachment regulations or at a minimum, explicitly and unequivocally stated that its existing rules all apply to wireless attachments.

The record in this proceeding makes clear that NextG is not alone in its problems with securing fair and reasonable attachment rights on utility poles. Entities who attach (or attempted to attach) wireless devices related to the Commission real-world examples of egregious behavior on the part of utilities in severely restricting, and in some cases, outright denying, access to poles. These comments further support NextG's overarching message to the Commission its Initial Comments – the *status quo* is not working and there is an immediate need for wireless-specific pole attachment regulations. As attachers from across the country communicated their experiences in dealing with electric utilities, several consistent themes emerged.

A. Utilities Are Imposing Unreasonable Attachment Fees

In its Initial Comments, NextG described how it routinely encounters demands for exorbitant "market" pole rental fees, and specifically how several electric utilities across the United States impose annual attachment fees of $1,200 per pole or more for wireless attachments. Other attachers of wireless devices described similar unreasonable demands. ExteNet described, for example, how one Florida utility charges an annual pole attachment fee of $1,564.50.[3] T-Mobile described how, in one state, wireless access to distribution poles is offered at $1,200 to $3,000 per year per pole on a take-it-or-leave-it basis – notwithstanding the fact that these rates are 20 to 50 times those previously established for wireless distribution pole attachments by the state public service commission.[4]

In addition to unreasonable annual pole rental fees, CTIA reported that "pole owners commonly demand exorbitant fees, including nonrefundable application and engineering fees (as

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3 ExteNet Comments at 4.

4 T-Mobile Comments at 5.

high as $25,000 to $45,000) to cover internal due diligence, installation fees ($80,000 to $100,000) and equipment inspection fees ($70 per hour, which may increase without limit)."[5]

Thus, the Commission has ample evidence of the need to clarify that wireless devices are entitled to be attached at regulated rates pursuant to the Commission's existing cost-based formula.

B. Utilities Are Denying Access to Utility Poles for Wireless Attachments

In its Initial Comments, NextG described how the lack of wireless-specific rules and clear guidance has created ambiguities and differing interpretations by utilities that, intentional or not, have acted to impede, restrict, or outright deny NextG access to utility poles. NextG gave the specific example of one major electric utility located in the southeastern U.S. that reserves the top *eleven feet* of its distribution pole for its facilities, in an effort to effectively deny access to its pole tops. ExteNet informed the Commission that one utility in Hawaii simply will not allow any wireless attachments, claiming that they are unsafe.[6] Crown Castle stated that Allegheny Power has imposed an outright ban on pole-top attachment.[7] These utility company policies fly in the face of orders of the Commission expressly stating that pole owners may not categorically deny pole-top access for wireless attachments.[8]

The comments filed by the Coalition of Concerned Utilities contain a startling admission that at least some of the coalition member utilities (Allegheny Power, BG&E, Dayton Power, FirstEnergy, KCP&L, National Grid and NSTAR) categorically deny access to poles, stating:

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5 CTIA Comments at 8.

6 ExteNet Comments at 7.

7 Crown Castle Comments at 5, n. 15.

8 *See, e.g., Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, 19 FCC Rcd. 24930 (Wireless Telecom. Bureau 2004) ("Public Notice").

"[w]ireless attachments raise a host of operational and safety concerns, and ***each utility must make its own decision whether it is comfortable permitting wireless attachments*** on its electric distribution system."[9] It may come as a surprise to the Commission that utilities are denying wireless attachers access to poles on the arbitrary basis of their "comfort," but NextG can confirm from first-hand experience that, in fact, some utility companies, particularly as a threshold matter, simply refuse to permit wireless attachments on their poles.[10]

Moreover, as discussed below, the Coalition of Concerned Utilities' comments fly in the face of the fact that some of its members, such as National Grid, have permitted antenna attachments, including to pole tops, for years and have in place detailed construction standards that deal with all of the alleged problems the Coalition otherwise tries to claim support their desire to reject wireless attachments without Commission oversight.

C. Utilities Are Delaying Access to Poles for Wireless Attachments

NextG's Initial Comments contained a discussion of how it routinely faces unreasonable delays in obtaining attachment rights for wireless attachments.[11] The process of negotiating a wireless pole attachment agreement can take years, resulting in delays to the deployment of critical telecommunications infrastructure and advanced broadband services.[12] NextG's experience is by no means unique. According to CTIA, "[w]hen carriers express interest in

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9 Coalition of Concerned Utilities Comments at 45 (emphasis added).

10 As NextG described in its Initial Comments, and as echoed by other commenting parties, too frequently, the process of seeking attachment takes months or years because the utility's threshold response is to oppose antenna attachment altogether, or to claim that they would need to study it at length. Alternatively, again flying in the face of their alleged claims of unresolved safety concerns, utilities frequently attempt to push NextG into the utility's "business development" department, where, if NextG will agree to demands for annual payments of thousands of dollars per pole, safety issues and access will suddenly be resolved. *See* NextG Comments at 6 -7.

11 *See* NextG Comments at 5 - 7, 20 - 22.

12 NextG Comments at 5 - 7.

attaching to poles, pole owners frequently take an unacceptable amount of time to respond or respond with unreasonable demands that delay the pole licensing process for months and even years."[13] Similarly, "ExteNet regularly encounters resistance and delays in its efforts to secure attachment rights from pole owners and implement its build-outs."[14] The DAS Forum described how "DAS operators often face long delays in obtaining pole attachment agreements. DAS Forum members report long delays by utilities in responding to initial requests for attachments and ***negotiation periods that often stretch from one to three years***."[15]

NextG further described in its Initial Comments that it has encountered other delays in the placement of its facilities on utility poles, particularly regarding performance of make-ready.[16] Other attachers face similar delays. MetroPCS, for example, described how make ready work can take anywhere from several months to several years.[17] Similarly, the DAS Forum reported that:

> Parties seeking to attach DAS antennas to utility poles face make-ready processes that are long, unpredictable, and expensive. DAS Forum members report that make-ready work usually takes between four and nine months to complete, depending on the number of nodes involved. ... In egregious cases, DAS Forum members report waiting as long as one year for the completion of make-ready work.[18]

The result of these delays is to deter the prompt and timely deployment of broadband and competitive telecommunications services, particularly broadband and next generation wireless networks.

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13 CTIA Comments at 8.

14 ExteNet Comments at 2.

15 DAS Forum Comments at 11 (emphasis added).

16 *See* NextG Comments at 20 - 21.

17 MetroPCS Comments at 7.

18 DAS Forum Comments at 9.

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In sum, the initial comments submitted by entities seeking to attach wireless facilities, and even some electric utilities, demonstrate that NextG is not alone in facing severe impediments from pole owners in the deployment of wireless attachments. Indeed, the problems appear to be pervasive throughout all regions of the country. The Commission should take careful note of the substantial record evidence put forth in this proceeding by entities deploying wireless and promulgate rules to thwart continued utility abuses.

III. RESPONSE TO POLE OWNERS' COMMENTS

The comments filed by the vast majority of the electric utilities must elicit a strong sense of *déjà vu*. The electric utilities all too frequently are asking the Commission to roll back the clock to 1995 – before the expansion of Section 224 to telecommunications carriers by the Telecommunications Act of 1996, before the Commission determined that wireless devices qualify as "attachments" under Section 224, and before the U.S. Supreme Court rejected the same utility arguments made today and held that Section 224 applies to protect wireless attachments. Some utilities even ask the Commission to toss 12 years of regulatory and judicial precedent out the window and declare wireless attachments to be *unregulated*. The Coalition of Concerned Utilities, for example, asks the Commission to take a "hands off" approach to wireless attachments and "not to set a mandated wireless attachment rate or otherwise impose obligations on utilities regarding wireless attachments."[19] But the Commission already has imposed obligations on utilities regarding wireless attachments (unfortunately they have not been sufficiently powerful to change some utility companies' behavior). Just as the Coalition's comments ignore the Commission precedent, many of the utilities that comprise the Coalition are

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19 Coalition of Concerned Utilities' Comments at 44.

ignoring the Commission's orders by denying wireless attachers reasonable (or any) access to their poles. At the same time, undermining the Coalition's public advocacy, other of its members have permitted antenna attachments for years and have dealt with all of the alleged safety and engineering issues the Coalition claims stand in the way of such attachment.

Now is not the time to re-litigate *National Cable & Telecom. Ass'n v. Gulf Power*,[20] in which the utilities' arguments were rejected. Rather, the record demonstrates that the Commission should promulgate a set of wireless attachment-specific rules to promote the efficient and prompt deployment of the "third pipe" for broadband by reigning in the continuing pattern of utility abuses chronicled in the comments.

A. The Commission Should Reject the Utilities' Call for "Market" Rates for Wireless Attachments

As NextG described in its Initial Comments, far too often, when seeking access to a utility's distribution poles, NextG is directed to discuss attachment with the utility's "business development" group, which focuses on the attachment of antennas to unregulated transmission infrastructure. These groups are tasked with treating pole attachments not as a regulated obligation of the utility, but as a profit center. The utilities' initial comments confirm NextG's experience and reflect an obvious desire to expand the work of these "business development" groups to distribution poles and give the utilities unbridled discretion to set any rate they choose. Indeed, NextG has recently encountered this behavior from some of the utilities that submitted extensive comments in this proceeding. Moreover, a critical message to take from the situation is that the various "safety" concerns that the utilities allege in this docket are resolved if the attaching party agrees to the utilities unregulated rates. In other words, as demonstrated

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20 534 U.S. 327 (2002).

elsewhere, the "concerns" that the utilities raise with wireless attachments are shown to be overstated, at least.

Denying the universally acknowledged (except among utilities) reality that there is no "market" for utility poles, the Coalition of Concerned Utilities takes the extreme position that wireless attachment rates should be entirely deregulated, stating "[w]ireless attachments should be handled by marketplace negotiations without government oversight."[21] The Commission should reject this call for an abrupt 180 degree departure from its long-standing policy and from the requirements of Section 224. As has been repeatedly concluded in the past, Section 224 mandates a cost-based rate approach. Moreover, the protections of Section 224, both in terms of requiring access and guaranteeing regulated rates, terms, and conditions applies on the plain language of the statute, to telecommunications attachments, regardless of whether they use wireless or wireline technology. To accomplish their goals, the utilities would have to obtain a change in the statute.

Some of the utilities attempt to re-assert the argument that they should be free from regulatory oversight for wireless attachments because, they assert, their poles are not bottleneck facilities for wireless deployment.[22] As a threshold matter, that argument was rejected by the Supreme Court in *Gulf Power*.[23] Section 224 does not require a showing that the attaching party has no other option for deployment. Indeed, using that theory, the utilities could argue that wireline facilities could theoretically be installed underground without ever using poles. But the point is that Congress made a national policy decision to promote the use of existing

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21 Coalition of Concerned Utilities' Comments at 45.

22 Coalition of Concerned Utilities' Comments at 44.

23 534 U.S. at 341.

infrastructure – infrastructure that utilities deployed for the public good – for the efficient deployment of modern communications networks.

Critically, this "available alternatives" argument is factually incorrect in the case of NextG's DAS networks. As a matter of technology and economics, NextG's facilities must use infrastructure in the public right-of-way and utility easements. As NextG explained in its Initial Comments, the deployment of next generation broadband wireless services and satisfying the growing demand for wireless telecommunications capacity and coverage (for example to meet E-911 needs) is leading to the need for new deployment techniques, in particular, the use of low power, low site networks that leverage the efficiency of fiber optic lines and existing right of way infrastructure. Simply put, NextG must use utility poles to provide its service. To say that NextG could use some other infrastructure would be to force NextG to provide an entirely different telecommunications service.

Other utilities suggest that a wireless-specific rate formula is unworkable because of the "unique technical issues"[24] or (unnamed) "difficulties" with establishing a wireless attachment rate and a supposed lack of "uniformity" among wireless attachments.[25] The Commission should reject these utilities' calls for a maintenance of the *status quo*, which is now resulting in demands for exorbitant rental fees by many utilities.

As NextG explained in its Initial Comments, the Commission should expressly order a straight-forward rate formula that applies to wireless attachments: the utility's wireline telecom pole attachment rate multiplied by the number of feet of usable space actually occupied by the wireless attachment.[26] The approach advocated by NextG and other wireless attachers[27] presents

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24 PacifiCorp., *et al.* Comments at 21.

25 Alabama Power, *et al.* Comments at 25-26.

26 *See* NextG Comments at 12 - 13.

no "difficulties" because it is a straight-forward matter to measure the amount of usable pole space occupied by the wireless attachment and multiply this footage by the utility's already available per-foot pole rate. While NextG acknowledges that there may be some variations among wireless devices sought to be attached to poles, the number of feet occupied on the pole can be easily measured, allowing the appropriate attachment fee to be determined in a matter of minutes.[28]

The Southern Company utilities state that "there are significant operational considerations and costs associated with wireless attachments that the current telecom rate does not take into account."[29] However, none of these supposed "considerations" and "costs" are identified in the comments, and the support for these statements is a declaration that merely repeats the same conclusory language.[30] Even if there were unique costs associated with the installation of wireless equipment, those costs would be and are covered by either make ready charges or the standard cost recovery of the Commission's formula. To the extent that the alleged costs are created by the utilities' insistence on undertaking unnecessary and time consuming "reviews" of wireless attachments, those costs are unnecessary and are not grounds for imposing rates that far exceed the utility's cost per pole. The Commission's pole rate formula has repeatedly been held to fully compensate utilities,[31] and NextG's proposed formula

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27 *See, e.g.,* MetroPCS Comments at 3; DAS Forum Comments at 13 – 14.

28 NextG notes that it is well established that vertical "riser" attachments are not included in calculating the amount of useable space occupied and should not be in the case of wireless attachments. *See, e.g., Texas Cablevision Co. v. Southwestern Electric Power Co.*, 1985 FCC LEXIS 3818 at ¶ 6 (1985).

29 Alabama Power, *et al.* Comments at 26.

30 *See* Alabama Power, *et al.* Comments, Exhibit 5, Declaration of Chandler J. Ginn.

31 *See FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *Gulf Power v. United States*, 187 F.3d 1326 (11th Cir. 1999).

fairly compensates utilities for additional pole space, if any, occupied by the wireless device beyond the one-foot presumption.

To be sure, some utilities have already adopted reasonable rates for wireless attachments. Ameren Electric Services and Virginia Power, for example, state that "Ameren and Dominion Virginia Power support the Commission's proposal to apply a suitable multiple of the broadband formula rate where wireless attachments and associated devices take up more than the one foot of space that is allocated for linear attachments," and "the Commission should find that a reasonable multiple of the broadband rate for wireless attachments is an appropriate way for wireless attachers to pay for the space they use."[32] NextG agrees with this approach, except that the Commission should clarify that usable space occupied by a wireless device does not include cables running between the antenna and the equipment box because this space is available for other attachments.[33]

B. Pole Top Attachments Should Not Result in a Higher Rate of Compensation

The Coalition of Concerned Utilities responded to the Commission's question regarding rates for pole-top attachments by again calling for complete deregulation, stating that because "pole tops cannot be used for more than one antenna, marketplace considerations are particularly appropriate."[34] However, as the DAS Forum, like NextG, concisely explained in its comments, the Commission

> should clarify that wireless providers are entitled to access to the tops of utility poles, limited only by NESC standards, and at no additional charge. There is no basis for a pole-top premium rate. Although a pole has only one top, it also has only one middle and one bottom; different portions of the pole will be desirable to

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32 Ameren/VEPCO Comments at 37-38.

33 Such an approach is consistent with Commission precedent. *See Texas Cablevision Co. v. Southwestern Electric Power Co.*, 1985 FCC LEXIS 3818 at ¶ 6 (1985).

34 Coalition of Concerned Utilities' Comments at 45.

different attachers depending upon their specific needs. The same rate should apply to all parts of the pole.[35]

No other electric utilities took the extreme position advocated by the Coalition of Concerned Utilities,[36] and the Commission should flatly reject its proposal to deregulate rates for pole-top wireless attachments as without record, legal, or logical support.

C. The Commission Should Adopt a Rule Establishing A Presumption Allowing Pole Top Attachments

Although in the Public Notice released in 2004 the Wireless Telecommunications Bureau reminded pole owners that pole top attachments cannot be categorically prohibited, the initial comments in this proceeding make abundantly clear that many utilities continue to resist or severely restrict pole-top placement. As NextG noted in its Initial Comments, utilities continue to attempt to justify these denials of access on the basis of nebulous and meritless safety concerns.

As an initial matter, NextG notes that none of the numerous comments filed in this proceeding reference even a single incident of safety or reliability being compromised as a result of a wireless attachment on a utility pole. This is not surprising. As NextG explained in detail in its Comments, installation and maintenance of wireless attachments are already addressed and

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[35] DAS Forum Comments at ii; *see also* NextG Comments at 13 – 15; ExteNet Comments at 5 – 6 (explaining that pole top attachments should not result in higher attachment fees; a pole top is not unique because ExteNet does not attach to every pole and pole top attachments free up space for other attachments below); MetroPCS Comments at 6 – 7 (explaining that pole top access is very important because coverage area is directly related to antenna height; this lowers the number of antennas needed; the fact that attaching parties have preferred locations on poles is not unprecedented; the Commission should not single out wireless attachments for higher rates merely because of the location of the attachment); Crown Castle Comments at 9 – 11 (utilities should not be permitted to use poles to extract additional profits beyond historic costs; pole tops are no more finite than communications space or supply space).

[36] Only the pole-owner ILEC Qwest Communications, without explanation or elaboration, echoed the Coalition's call for a "market rate of compensation" for pole-top wireless attachments. *See* Qwest Comments at 6. However, Qwest did not explain how a pole top is any less unique than the 18 feet-above-grade point on poles where it typically makes its attachments.

governed by the National Electrical Safety Code ("NESC") and FCC and OSHA regulations, which are specifically designed and intended to ensure safety for the public and workers, and to ensure the reliability of the nation's electric distribution infrastructure.[37]

And yet, the Coalition of Concerned Utilities posits to the Commission a three-page long laundry list of supposed "questions and concerns" about wireless attachments, including, for example, their impact on electric service reliability, operational ramifications (clearances, climbing space, maintenance, etc.), RF concerns, OSHA requirements, utility liability, wind and ice loading, and so on.[38] However, the Coalition fails to mention that each of these supposed questions has already been answered by pre-existing regulations, governing mandatory safety standards, and/or standard industry procedures. For example, questions about clearances between antennas and power lines have been answered by NESC Rule 235I; questions about pole loading have been answered by Sections 24 - 26 of the NESC; questions about RF emissions are addressed by 47 C.F.R. § 1.1310 and OET Bulletins 56 and 65; and questions about OSHA requirements have been answered by existing OSHA regulations, 29 C.F.R. §§ 1910.97 and 1910.268.[39]

Loading concerns have likewise already been addressed, and in no event would constitute grounds for a blanket prohibition. As NextG's opening submissions demonstrated, the loading impact of an antenna and associated equipment is miniscule in comparison to the impact of even

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37 *See* NextG Comments at 17 – 18, 26 – 29, Attachment 2 (pertinent NESC safety rules). Even if equipment failures had occurred, that alone would not be grounds for wholesale denial of access or delay in deployment. The reality is that even when all of the most stringent standards are followed, failures occur, including failures by the utility companies' equipment. However, companies, such as NextG, who follow applicable safety standards and regulations should be permitted to install their facilities without delay.

38 Coalition of Concerned Utilities' Comments at 45-48.

39 *See* NextG Comments at 17 – 18, 26 – 29, Attachment 2 (pertinent NESC safety rules).

a single horizontal line extending between poles.[40] Indeed, in NextG's example, the loading impact was even less than that of the electric transformer on the pole.[41]

The Coalition's litany of unsupported claims regarding the safety of wireless attachments are particularly suspect when contrasted with the representations made to the New York Public Service Commission by National Grid, a Coalition member, in the *Niagara Mohawk/GridCom* proceeding.[42] For example, in the *Niagara Mohawk/GridCom* proceeding, National Grid justified the safety of pole top wireless attachments on the basis that "all installations shall be made in compliance with all applicable codes including the NESC and [the National Electric Code]," and that maintenance and installation safety would be assured because any work performed in the electrical supply space would be done only by qualified electrical workers.[43]

The Southern Company utilities include their own list of "concerns," including lightning, wind, and RF emissions.[44] These utilities go so far to as state that "some wireless devices can emit an RF signal with sufficient power to be hazardous to people" – utterly ignoring the fact that RF emissions are subject to a host of FCC and OSHA regulations specifically designed to

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40 *See* NextG Comments at 28 (citing Declaration of David Marne, submitted to the New York Public Service Commission with NextG's comments in the NY PSC's *Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, NY PSC Case 07-M-0741 (filed Sept. 10, 2007);

41 *Id.*

42 New York PSC Case 03-E-1578, *Joint Petition of Niagara Mohawk Power Corporation and National Grid Communications Inc. for Approval of a Pole Attachment Rate for Certain Wireless Attachments to Niagara Mohawk's Distribution Poles*, Order Approving Petition with Modifications.

43 New York Case 03-E-1578, *Joint Petition of Niagara Mohawk Power Corporation and National Grid Communications Inc. for Approval of a Pole Attachment Rate for Certain Wireless Attachments to Niagara Mohawk's Distribution Poles,* Joint Petition Exhibit 2, License Amendment and Addendum to Distribution Pole Attachment, Exhibit 4, GS1169 at p. 1

44 Alabama Power *et al.* Comments at 34.

protect the public and workers.[45] The Southern Company utilities also fail to mention that wireless devices attached to utility poles are grounded in accordance with both NESC and National Electrical Code ("NEC") standards,[46] thereby minimizing undue risks posed by lighting strikes.

Florida Power & Light, et al. ("FP&L") includes its own laundry list of alleged safety concerns regarding wireless attachments.[47] None of these supposed concerns has merit.

- FP&L states that the attachment of equipment in the power supply space will add to "congestion," rendering it "more dangerous" for workers.[48] But these comments fail to mention that NESC Rule 237's standards govern working space considerations. NextG and other attachers are required to attach in accordance with these guidelines, which ensure adequate working space for employees.
- FP&L states that pole-top attachments "present danger to third party workers who may not be accustomed to working in close proximity to lethal voltages."[49] But the FP&L comments fail to mention that NESC Rule 235I(1) expressly mandates that "[c]ommunications antennas located in the supply space shall be installed and maintained only by personnel authorized and qualified to work in the supply space." FP&L's implication that "third party" workers present a danger is a red herring because no unqualified third party workers will work on antennas located in the power supply space.

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45 *See* 47 C.F.R. § 1.1310 and OET Bulletins 56 and 65; 29 C.F.R. §§ 1910.97 and 1910.268 (OSHA regulations pertinent to wireless attachments).

46 *See* NESC Section 9 and NEC Article 810. NextG has been able to work with utilities to ensure that its attachments do not create increased lightning strike risks to the electric power plant.

47 *See* FP&L et al. Comments at 16-17.

48 *Id.* at 17.

49 *Id.* at 17.

- Finally, FP&L raises a concern about the impact of antennas on wind loading,[50] but this concern is overstated. FP&L's declarant asserts that the impact of placing an antenna at 45 feet instead of 16 feet doubles the impact. But that misses the point. As NextG noted in its Initial Comments and demonstrated in studies performed by an NESC expert for NextG, the wind loading impact of NextG's antennas is *significantly* less than the wire spans attached between nodes,[51] and is extremely unlikely to create a loading issue on any pole. Moreover, if there are loading issues, they can be dealt with on a pole specific basis.

Moreover, the Declaration of Thomas Kennedy attached to the FP&L Comments contains a very telling statement. Mr. Kennedy states that "FP&L "worked closely with several wireless carriers to resolve pole top access requests."[52] However, FP&L's "resolution" was ***not*** to afford access to pole tops, but rather, to deny access until "these carriers accepted installation of their antennas in the communications space."[53] In other words, FP&L denied these carriers pole top access, and the carriers were left with no option but to accept an inferior placement on the pole (communications space), walk away from the project, or file a complaint with the Commission – a costly and lengthy process, as the utilities know full well.

But as NextG explained in its Initial Comments, being forced to place antennas in communications space is hardly a satisfactory "resolution." Pole top placement of antennas

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50 *Id.* at 17.

51 *See* Next G Comments at 28 (citing Declaration of David Marne, submitted to the New York Public Service Commission with NextG's comments in the NY PSC's *Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles*, NY PSC Case 07-M-0741 (filed Sept. 10, 2007); and Reply Declaration of David Marne, submitted to the Commission by NextG in the FCC complaint proceeding *NextG Networks of NY, Inc. v. Public Service Electric & Gas Co.*, File No. EB-07-MD-004 (filed Feb. 11, 2008)).

52 FP&L Comments, Ex. 1, Declaration of Thomas J. Kennedy at ¶ 11.

53 *Id.*

provides greater coverage by the simple fact that it is higher than a mid-pole attachment.[54] Because mid-pole attachment produces less adequate coverage, more antenna attachments are required, on average as many as double the number, thereby increasing network cost and increasing the potential community "impact."[55]

Two other utilities, Ameren and Virginia Power, ask the Commission to "make clear that, pursuant to Section 224(f)(2), pole owners should be permitted to ***reject all pole top attachments*** for system-wide reasons of engineering and safety."[56] But Section 224(f)(2) mandates that access to pole tops may ***only*** be denied on the basis of "safety, reliability and generally applicable engineering concerns." As NextG has demonstrated, there can be no "system-wide" safety or engineering basis for categorically rejecting pole top attachments because as a general matter, such attachments are contemplated and covered by the NESC. The exception allowing a utility to deny access in a particular case cannot be allowed to swallow the rule – particularly when all the evidence demonstrates that as a general matter, pole top attachments can be made safely and without adversely affecting engineering. NextG, therefore, reiterates its request for the Commission to adopt an explicit rule establishing a presumption that pole top attachments for wireless devices are allowed.

To reiterate, NextG fully supports and follows standard applicable safety and engineering codes, such as the NESC and NEC. NextG does not contend that either its attachments or any attachments do not have potential safety and engineering ramifications. The critical point is that the utility company commenters that use "safety" "concerns" as alleged grounds for wholesale denial of wireless attachments are refusing to recognize that existing standards and practices

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54 NextG Comments at 16 - 17.

55 *Id.*

56 Ameren/VEPCO Comments at 38.

exist to allow the safe attachment of wireless devices, including in and above the power space on distribution poles. NextG is committed to the safety of its workers, the workers of other attaching parties, and the general public. The best answer to promote safe attachments is to follow broadly established rules and standards, not to let individual utility companies generally deny access based on their own sense of what is safe.

D. The Commission Has the Authority to Adopt A Presumption Allowing Pole-Top Attachments

The Southern Company utilities assert that the Commission should not adopt a presumption allowing pole-top attachments because: (1) the Commission lacks jurisdiction to do so; (2) such a rule would unlawfully shift the burden to the pole owner; and (3) such a rule threatens the safety and reliability of the electric distribution system.[57] None of these arguments has merit.

First, the Southern Company utilities concoct a tortured argument that "the Commission has no jurisdiction to require utilities to grant access for wireless attachments to their pole tops when the utilities have not previously designed their pole tops for communications proposes."[58] This theory is based on short excerpts from legislative history of the 1978 Pole Act and early Commission pole cases decided under the original version of Section 224, which gave the Commission jurisdiction over poles only if utility had permitted third party attachments.[59] This argument is easily answered. By its terms, Section 224(b) gives the Commission broad jurisdiction over the "rates, terms and conditions for pole attachments." A "pole attachment" is defined as in Section 224(a)(4) to be "any attachment by a ... provider of telecommunications

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57 Alabama Power *et al.* Comments at 32-35; *see also* Florida Power & Light, *et al.* Comments at 32 - 35, which make the same arguments essentially verbatim.

58 Alabama Power *et al.* Comments at 33.

59 *Id.* at 32-33.

service to a pole, duct, conduit or right-of-way owned or controlled by a utility." Nothing in these definitions or any other provision of Section 224 limits the Commission's jurisdiction to a narrow, abstract portion of a pole, which can be arbitrarily defined by utilities. Such a reading of the statute would allow utilities to eviscerate the Commission's authority entirely by simply declaring all of its pole space to be electric supply space. Moreover, in 1999, the Commission expressly declined to establish a presumption that space above what has traditionally been referred to as "communications space" on a pole may be reserved for utility use only,[60] so the Commission clearly has – and has, in fact, exercised – jurisdiction over poles *in their entirety*.

The utilities' argument is also contradicted by their own behavior. Numerous utilities around the country have installed communications attachments at the pole top and in the so-called "power" space. As NextG discussed in its opening comments, utilities have installed all-dielectric self supporting ("ADSS") fiber in the power space for communications purposes.[61] And utilities have installed their own wireless facilities at the pole top. The argument that the Commission only has jurisdiction over a small section of the middle of the pole is meritless. No such limitation appears on the face of Section 224, and none would make sense.

Second, the Southern Company utilities state that "Section 224(f)(2) specifically gives utilities the right to deny access ... without placing any burden on utilities why access should be denied." In other words, the utilities suggest that any old pretext will suffice under Section 224(f)(2). But this position has been flatly rejected by the Commission multiple times:

- In *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power and Light Co.*, Consolidated Order, 14 FCC Rcd. 11599 (1999) (at ¶ 11), the Cable Services Bureau ruled that "[t]he utility may rely on the NESC to provide standards for safety, reliability, and generally applicable engineering standards, ***but the***

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60 *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 14 FCC Rcd. 18049 at ¶ 72 (1999).

61 *See* NextG Comments at 19 - 20.

utility is not the final arbiter of such issues and its conclusions are not presumed reasonable." (emphasis added).

- In *Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996) (at ¶ 1158), the Commission rejected the electric utility claims that they could unilaterally establish safety and engineering standards, stating: "we reject the contention of some utilities that they are the primary arbiters of ... concerns [about capacity, safety, reliability or engineering] or that their determinations should be presumed reasonable."

- In *Arkansas Cable Telecommunications Ass'n v. Entergy Arkansas, Inc.*, Hearing Designation Order, 21 FCC Rcd. 2158 (2006) (at ¶¶ 8-12), the Enforcement Bureau rejected Entergy's contention that the Commission lacks jurisdiction to decide whether Entergy's application of engineering standards is unjust and unreasonable under Section 224(f)(2).

- In *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, Order and Request for Information, 15 FCC Rcd. 9563 (2000) (at ¶¶ 10, 19), Virginia Power claimed that "every practice and policy it employs is absolutely necessary for the safe and reliable delivery of electric power to its customers." However, Virginia Power's own attachment practices proved otherwise, and the Cable Services Bureau ordered the utility to "cease and desist from selectively enforcing safety standards or unreasonably changing the safety standards to which [Cavalier] must adhere."

Thus, the Southern Company utilities' assertion that they have unbridled discretion to deny access on the basis of Section 224(f)(2) is wholly at odds with established Commission precedent.

Finally, the Southern Company utilities' claims that a pole-top presumption threatens the safety and reliability of the electric distribution system has been answered in Section III(B) above and in Sections IV(A) and (F) of NextG's Initial Comments. The record in this proceeding makes clear that wireless devices can be and have been safely installed on utility poles, including at the top, without adversely affecting safety or reliability.

Moreover, the widespread practice of electric utilities deploying wireless devices on utility pole for their internal operations further demonstrates that this practice does not affect safety or reliability. Indeed, the Coalition of Concerned Utilities recognizes that they have

already attached their own wireless devices when they assert that "equipment will need to be tested to ensure that it does not interfere with SCADA [*i.e.*, System Control and Data Acquisition] and other utility radio communications."[62] Of course, RF interference issues, particularly where the attaching party is using FCC licensed frequencies, is not a matter for the utilities to dictate or control. Yet, these same utilities have represented to this Commission that wireless devices attached to poles raise a "host of operational and safety concerns" and "difficulties for utilities."[63] These assertions are demonstrated to be meritless not only by the other evidence introduced, but in particular by their practice of deploying wireless devices on pole tops for their own purposes.

E. The Commission Should Adopt a Rule Permitting Qualified Electrical Workers to Perform Make-Ready and to Install and Maintain Wireless Attachments

In its Initial Comments, NextG explained the need for a rule expressly permitting the use of qualified electrical contractors and clarifying that the rule applies to wireless devices and related equipment, as well as wireline attachments.[64] Such a rule is necessary in light of some utilities' failure to heed the Commission's otherwise clear precedent ruling as such.[65]

On this point, the Coalition of Concerned Utilities assert that they should have sole control over the labor pool,[66] a point that further emphasizes the point and the scope of the issues new attaching parties face. In the face of economic recession, these companies want to limit the

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62 Coalition of Concerned Utilities' Comments at 47.

63 *Id.* at 45.

64 NextG Comments at 23-24.

65 *Id.* (quoting *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and CMRS Providers*, Order on Reconsideration, 14 FCC Rcd. 18049 at ¶ 86 (1999)).

66 *See* Coalition of Concerned Utilities' Comments at 87 - 88.

ability of workers to work and to prohibit NextG and others from expanding employment opportunities for existing qualified workers. Indeed, NextG's deployment will not limit the utilities' pool of qualified workers; it will actually *increase* the labor pool available to the electric utility. A company like NextG, in order to meet its time to market demands, will hire a qualified electrical contractor who might employ and, where necessary, train ten workers to perform make-ready in 45 days, where a utility company would want to use only three workers over a six- to eight-month period to get the work done around their other demands. Allowing qualified electrical contractors to do make-ready work gets more linemen working. Further, in emergency conditions, the qualified electrical contractors would likely already have contracts with the utilities to do restoration work. In fact, in a recent build where NextG used a qualified electrical contractor to do make ready and installation of pole-top antennas, that qualified electrical contractor also had a contract with the local utility to support storm work. On four occasions, when storms hit, the crews working on NextG's installations assisted electric utilities in storm restoration. NextG's approach led to a pool of more experienced, qualified workers for the utility to call into action for future weather or other emergencies.

IV. CONCLUSION

Given the overwhelming record evidence put forth by NextG and other attachers of wireless equipment in this proceeding, NextG respectfully submits that the Commission should adopt rules that explicitly recognize and protect wireless attachments, including but not limited to the following:

- a rule that the rate applicable to wireless attachments equals the utility's telecommunications pole attachment rate multiplied by the number of feet of useable space actually occupied by the wireless attachment, but excluding risers, consistent with existing precedent;

- a rule that pole top attachments must be assumed to be allowed;
- a rule allowing ADSS fiber installation in the "power space" on poles and prohibiting pole owners from categorically prohibiting attachments to any part of the pole based on claims of "safety" where the attachments would comply with NESC standards;
- a rule permitting the installation of equipment boxes in unusable space;
- a rule permitting attaching parties to use any qualified electrical workers to perform make-ready work and to install and maintain attachments, including wireless attachments;
- a rule prohibiting utilities from declaring street light poles and distribution poles with attachments above a certain voltage "off limits" to wireless attachments;
- rules mandating performance of preconstruction surveys and completion of make-ready work within the specific timeframes set forth in NextG's opening comments; and
- a rule establishing a presumption that wireless attachments that comport with the NESC and FCC and OSHA regulations may not be denied categorically on the basis of safety or reliability.

Respectfully submitted,

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April 22, 2008